In the Matter of Arbitration

Between

Bay State Milling Company,

Winona, Minnesota

Employer

And

Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union AFL-CIO, CLC, Local 133G

Union

FMSC No. 150227-53842-B (Pay Rate)

Carol Berg O'Toole

Arbitrator

Representatives:

For the Employer:

Kurt J. Erickson, Esquire

Jackson Lewis PC

225 South Sixth Street #3850

Minneapolis, Minnesota 55402

For the Union:

Robert D. Metcalf, Esquire

Cummins & Cummins

1245 International Centre

920 Second Avenue South

Minneapolis, Minnesota 55402

Witnesses:

For the Employer:

Sarah Sylvester, Human Resources Generalist

Tony Lippert, Plant Manager

For the Union:

Brian Ender, Maintenance Worker and Millwright, Former Local President

Preliminary Statement:

The hearing in the above matter commenced and concluded on the same day, August 27, 2015. The parties involved are Bay State Milling Company (Employer) and BCTGM, Local 133G (Union). The Employer and the Union are signatories to a labor relations contract (Contract) governing the arbitration.

The parties presented opening statements, oral testimony, oral argument, and exhibits. The parties stipulated to Joint Exhibits 1-11. Transcript at 5. The Employer offered Exhibits 12-15. Transcript at 6. The Union offered Exhibits 1, 2, and 3. All exhibits offered were received with the arbitrator's admonition that depending on the exhibit, some would be given less weight. The hearing was transcribed. The parties stipulated that the Employer who ordered the transcript would provide an inspection copy if the Union did not order and pay for a copy. Transcript at 15. Post hearing briefs and reply briefs were filed electronically and by U.S. Mail by both parties. The arbitrator closed the hearing upon receipt of the last reply brief by U.S. Mail on November 12, 2015.

Issue Presented:

The parties could not agree on an issue, so the arbitrator fashioned the following: Did the Employer violate the Contract when it paid employees the utility rate for weekend overtime work; if so, what is the remedy?

Jurisdiction:

The Contract provides that the Union is the "sole collective bargaining agency for all workers of the Company employed at its plant in Winona, Minnesota, except for superintendents, foreman, supervisors, millers, employees taking training courses and sometimes known as "Apprentices", clerks in offices, buyers, and salesmen…" Joint Exhibit 1, Section I, Recognition. The Contract's duration is from July 1, 2013, to June 30, 2016.

The parties are before the arbitrator by virtue of the Contract, Section X, Grievance Procedure. Joint Exhibit 1. The parties agreed that there were no issues in dispute regarding the selection of the arbitrator. However, the Employers contends that there are two timeliness issues involving the grievance.

Employer's Opening Argument Related to Timeliness:

The Employer states that the grievance is untimely in two respect: its initial filing was late; the appeal to arbitration was late. The Employer argues that paragraph 43 A of the Contract provides that the Union must present the grievance within five working days. Joint Exhibit 1. The employer contends that because the Union missed the time line, the grievance was waived. Joint Exhibit 2. Counsel points out that the grievance doesn't specify a date. Transcript at 17.

In addition, the Employer argues that the appeal to arbitration must happen within three months of the parties' determination that a settlement cannot be reached at the third step. The Employer states that the response at the third step was October 15, 2013, and the Union's request for arbitration occurred on January 13, 2014. However, the Employer states it wasn't on notice until January 21, 2014, because it didn't receive the notice of appeal to arbitration until then. Joint Exhibits 4, 5 and 6.

Union's Opening Argument Related to Timeliness:

The Union argues that the Employer may have some valid issues but they have not raised the timeliness issue regarding the initial filing of the grievance arbitration until the arbitration hearing. Transcript at 20. The Union states that the grievance was filed timely because it was filed within five days of the payroll period. Counsel states that the payroll period ended on March 30, checks were received on April 3, and the grievance filed on April 5, 2014. Transcript at 20.

In regard to the demand for arbitration, the requirement in the Contract is three months not ninety days which makes the deadline January 15. Transcript at 23. The Union argues that Joint Exhibit 5 shows a mailing on January 13, 2015, and that was timely. The Union points to the language of the Contract speaking to the mail date not the receipt date. Joint Exhibit 1.

Discussion

<u>Initial Filing</u>

The first timeliness issue is related to the initial filing of the grievance. The Contract, Section X, paragraph 43A, provides timelines. The grievance is timely if the grievance is filed within five days of the action or inaction complained of.

The grievance document itself, Joint Exhibit 2, is undated. Neither of the Employer's responses to the grievance at Step 2 or Step 3 makes mention of the timeliness issue. Joint Exhibit 2 and 3.

Neither Sarah Sylvester (Sylvester), nor Tony Lippert (Lippert) testified that they received the initial grievance document late, early or on time. Counsel for the Employer argued that the initial filing was untimely. Counsel for the Union said that the timeliness objection related to the initial filing was raised for the first time at the arbitration hearing. Transcript at 20. Throughout the grievance process both parties acted as if the initial filing of the grievance was timely, until the appeal to arbitration. I find those actions and the lack of evidence of the Employer's objection to be telling.

Appeal to Arbitration

The second procedural issue is the timing of the appeal to arbitration by the Union. The Contract provides in Section X, paragraph 43, that the appeal must be in writing and mailed by Certified Mail, within three months after the parties have determined settlement can't be reached. Joint Exhibit 1. The Employer argues that the three months period expired; thus, the appeal to arbitration is untimely because they did not receive the demand in the mail on time. The Union argues that three months means three months, not ninety days. They state that the date the certified letter was mailed was January 13, 2015, less than three months, so it is well within the timeline. The Union argues that the testimony regarding the receipt of the appeal to

arbitration is irrelevant. The Union points to the Contract requiring mailing within three months, not receipt. I agree. I am not going to add to the Contract's language a requirement that the appeal to arbitration be received within a certain timeline. This Contract only requires mailing by a certain date. The Union did that and the exhibits show it. That constitutes compliance with notice requirements for an appeal to arbitration.

Award

I find the Union's filing of the initial grievance and the appeal to arbitration timely.

Union's Opening Argument on the Substantive Issues

Counsel for the Union described the issue. Utility workers in the plant move around doing cleaning and light maintenance. Every worker is assigned to a department except utility workers. Utility workers don't acquire department seniority. Very often the weekend overtime work on Saturday and Sunday involves normal processing, including cleaning. One of the relevant sections of the Contract is Section 5, page 13, entitled Seniority. Joint Exhibit 1. Counsel described the voluntary overtime and forced overtime. The Union advocate stated that in October, 2013, the Employer began paying skilled workers the utility rates rather than paying the skilled workers their "regular" rate. Counsel argued that this is in violation of Section IX, paragraph 38 of the Contract as well as the long-standing practice. He stated that the Union would call one witness with 27 years of history who will testify that workers always received their regular rate of pay, regardless of the overtime work done.

Counsel described two instances where the Employer erroneously paid the lower utility rate to a skilled worker. The Union grieved the actions and the Company changed course and

paid the workers' regular, higher rate. In summary, the Union's case stands on "years of past practice" and specific Contract language. In closing, the Union framed the issue, "Did the company violate the [C]ontract when it paid employees doing weekend overtime work at the utility pay rate rather than at the employee's regular job classification, and if so, what is the remedy?" Transcript at 37.

Employer's Opening Argument on the Substantive Issues

Counsel for the Employer opened by stating that, "We pay people on the basis of skill and job." He pointed to the Contract's Philosophy section on page 3. Joint Exhibit 1. He stated that all employees are expected to perform their specific function in a manner that supports the Employer's mission and to be involved in the Employer's quality improvement plan which has been implemented in order to improve efficiency, educate employees, and to generally improve communications. Joint Exhibit 1 at page 3. He argued further that the Union proposed the language of Section IX, Reassignment, Paragraph 39. Joint Exhibit 1. Counsel argued that "temporary" means one or two days and that all provisions of the Contract must be applied including paragraph 38 which says "you [are] paid the same." Joint Exhibit 1, Paragraph 38. Counsel argues that this refers to voluntary overtime. Counsel argued that if you do utility work, the Employer ought to be able to pay utility rates. Counsel stated that, in prior instances, the Union hasn't challenged it and there have been no grievances. Counsel stated that the light gray portion of Joint Exhibit 10 resulted in no grievance and alleged that it is far from clear that there is a pattern or practice. He said there is a difference between voluntary sign up and being forced. He pointed out that the utility rate is $16 and the packing rate is $24. He concluded by saying that the issue should be, where there is no pattern or practice, "are we going to read out

provisions in paragraph 39, are we going to use the contract to cover situations not specifically covered in the contract with regard to the issue of whether or you can voluntarily sign up for utility work." Transcript at 43.

Union's Case in Chief

Witness: Brian Ender (Ender)

Ender testified that he has worked at Bay State Milling since March, 1988, currently works as a maintenance millwright. Transcript at 44. Ender indicated he has been Union president twice for a total of fifteen years. Transcript at 44-45. He described the company and the work of the employees as, "We make flour, we make different grades of flour. We work as—we sell to wholesalers a product. It's been around for over 100 years. Our motto has always been to make the best flour on the market, of course, and we sell as that." Transcript at 45.

Ender described the process of milling and the seniority system where, once you achieve a classification you accrue department seniority, except utility employees who do not accrue department seniority. Enders stated that, "You never lose that department seniority. Transcript at 46. He described plant seniority as previously starting the day you are hired, but, now, starting after ninety days. He testified that employees now serve a 90 day probationary period. Transcript at 46. Ender was asked about the utility position. Transcript at 46. When asked if the utility persons do work other than sweeping, he stated, "Yes, utilities replace or work what we call the progression schedule….They are used for relief, when a person is absent." Transcript at 47.

Ender testified that the purpose of the language in paragraph 38 which goes back a long way---20 years---was to avoid employees saying it is “not my job”. Transcript at 48-49. He said the company wanted flexibility. Transcript at 48.

Ender testified that overtime is performed, “I’d say, 90 percent of the time or better, 99, I don’t remember. Maybe one weekend a year we don’t work the weekend.” Transcript at 49. Enders stated that, “I can’t remember the last time it happened.”
Transcript at 49.

Enders was asked if on occasion the company required overtime for purposes other than the normal processing, like cleaning. He said at least a couple of times a year they did and more lately. Transcript at 50-51. Enders testified that, before the use of the signup sheet for overtime, the Employer “would come up and ask you”. Transcript at 51. He stated that within the last six to ten years or maybe less, the Employer has put up a sheet asking who wants to work. Transcript at 51.

Ender was asked if there had been occasions where people doing this work had not been paid their classification rate of pay. He replied, “No.” Transcript at 60. “Actually since March of 1988 until just recently, with this grievance, there was never ever a question about it. I mean, they wanted all the bodies they could. They would say cleaning, come, and everybody got paid their rate of pay. Year in and year out.” Transcript at 60. Enders stated that a “couple of times” higher classified workers were paid the lower utility rate but it was resolved by filing a grievance. Transcript at 61.

Enders said the Company may have improperly paid the lower rate. "They may have but it was never brought to my attention. " Transcript at 62.

Ender was asked if there had been occasions where people doing this work had not been paid their classification rate of pay. He replied, "No", except for the grievance. He indicated that he had been somewhat out of touch during the last year, since February, 2014.

Ender testified that the current plant manager came to Bay State in Winona in July or August, 2013, when the Contract was being negotiated. The plant manager was involved in negotiations, as was he, Ender testified. Transcript at 62. He said that during the negotiations neither party raised any issue about how weekend overtime would be paid. Transcript at 62.

Ender testified that the Employer relies on paragraph 39 of Joint Exhibit 1, as rational for paying the utility rate for cleaning for anyone who volunteers on weekends. Ender said that would be "taking the Contract out of context". Transcript at 71. Ender said that section applies to job elimination where an employee can use seniority to find a home. Ender pointed to Union Exhibit 3, a personal action form and said it was not connected to the issue at hand but was where an employee named Scott Enlenfeldt transferred from one department to another. Transcript at 73. Ender described him as "bumping" into the position that paid lower utility wages and stated that you have to be laid off to bump into a lower paid job. Transcript at 76-77.

During the cross examination of Ender, he was asked about the January 25, 2015, signup sheet for overtime. Union Exhibit 1, page 5. Transcript at 80. Enders testified that, "There isn't a classification that doesn't clean". Transcript at 81. He was also asked whether the

Employer's interpretation of the Contract which allowed them to pay everyone doing cleaning the lower utility rate, was a "possible" interpretation. He said that it was.

Ender was asked about Joint Exhibit 10, the 5/24/2015 payroll document. He said that the person in grey shading on the exhibit, who was a head packer paid the lower utility rate for work, had actually bumped the utility worker out of the job. He also said that the date was wrong. Ender said that Employer Exhibit 21 was also a matter of bumping. Ender said there was nothing in the Contract about signing up for work voluntarily that permitted the Employer to pay the lower rate.

Enders was asked about an employee named Jeff Fortsch who was paid the utility rate instead of his higher classification rate. Transcript at 93. Enders said he didn't grieve because he bumped the man out. "He took his job and sent that man home, then he will get paid that rate of pay." Transcript at 93. Enders testified that this is different than the issue in the grievance. Enders testified that he was not familiar with an incident involving an employee named Kevin Ties. Transcript at 96. Enders also identified Employer Exhibit 23 as involving bumping, not the issue in the grievance. Transcript at 99. Enders said there was nothing in the Contract about signing up for work voluntarily that permitted the Employer to pay the lower rate. Transcript at 100.

Witness: Sarah Sylvester (Sylvester)

Sylvester testified that she has been the Human Resources Generalist at Bay State Milling for four and one-half years. Transcript at 105. Her duties related to the Contract include hiring, policy interpretation, administering leaves of absence, processing employee

changes, attending committee meetings, hearing grievances, interpreting the Contract, and applying the Contract. Transcript at 105-106. She testified that she confers with the plant manager. Transcript at 106. Sylvester testified that the language of paragraph 13, 32, 38, and 39 of the Contract is similar to the language in Joint Exhibit 1, the Contract involved in the instant arbitration. Transcript 107.

Sylvester explained the signup sheets. She indicated the grievance was the only objection she had received from the Union. She was asked if the payment of the utility rate to employees who sign up for weekend overtime regardless of their regular rate of pay, violated the Contract. She stated that it didn't. Transcript at 123.

In the cross examination of Sylvester, she was asked about the signup sheets. She said that the process was for the convenience of everybody. Transcript at 136. She stated that if no one signs up the Employer would have to "force". In that case as far as seniority goes, they would have to work from the "bottom up". Sylvester stated that since May, 2014, the Employer has paid the utility rate to classified employees. She indicated that there had been a lot of discussion since the grievance was filed and that she understood the Union position. Transcript at 143. She also testified that she thought the decision on the instant grievance would cover the same situation that arose between the time the grievance was file and the present. Transcript at 144-145.

On redirect and re-cross examination, Sylvester testified that cleaning and utility work on the weekend would be the primary job the Employer looked to fill. Sylvester said the usual posting is for "cleaning", not "utility", but that the company position is that clean up, by its

nature, is utility work. Sylvester said that re-work has been utility work for at least four and one-half years. She also stated that cleaning the third floor was utility work. Sylvester said that utility work is half cleaning and half filling in with other classes, but wouldn't say that cleaning was the most important. Transcript at 150-151. She said that everyone in the plant is qualified to do the basic cleaning work. Transcript at 152.

Witness: Tony Lippert (Lippert)

Lippert testified that he had been plant manager at Bay State-Winona for two years. Transcript at 154. He testified that his duties entailed planning for the future, dealing with the budget process, handling operational issues, meeting with the labor committee and applying the Contract. Transcript at 154. In regard to negotiating the Contract, he witnessed it but did not talk during the negotiations. Transcript at 154.

Lippert identified Joint Exhibit 2, the grievance. He said he denied it after consulting and investigating. Transcript at 155. Regarding the issue of the instant grievance, Lippert testified that, "There were times it had been paid at the classified rate and there were times it had been paid at utility rate. " Transcript at 156. He thought the practice was inconsistent and confusing in light of the Contract. He testified, "It wasn't clear, as far as what the pay rate would be , either 32 C or 13. It doesn't address here's what the employee should be paid if they bump into that position or they choose to do it in a layoff situation." Transcript at 157-8.

Lippert testified, "Yeah, we talked about paragraph 39 and when it should apply or when it shouldn't apply, and there was disagreement." Transcript at 159. Asked how he resolved the inconsistency about paragraph 39, Lippert testified, "Looking at it, to me, it was

clear to me that they had been moved, their job was not required, and subsequently that would be the pay rate they would receive." Transcript at 160. Lippert goes on to say that, "They were laid off." Transcript at 160. Lippert testified that his philosophy was to pay people for the work they're currently performing." Transcript at 162.

On cross examination, Lippert indicated he had come from Dallas, Texas, and worked for WhiteWave, producing Horizon Organic milk and Silk plant based beverages International Delight creams. Transcript at 164. He started work at Bay State in November, 2014. Transcript at 165. Lippert described how he came to the conclusion about pay for overtime cleaning work. When he got the grievance, he consulted with the leadership team, but did not talk to any prior plant manager. Transcript at 165. He looked at some past grievances, but said they weren't the grievances that were in the record as exhibits. Transcript at 166. Lippert testified how he squared the language of paragraph 13, second paragraph, which says, " [T]he affected employee will not be paid less than their regular job classification" . Joint Exhibit 1. "Utility is not part of the department, subsequently this would not apply to the utility work being done on weekends." Transcript at 168.

Discussion

Clear Language and Past Practice

The Employer argues that the language is unclear so past practice should rule. Past practice is relevant if the language of the Contract is unclear. I find the Contract language is clear so past practice, although it supports the Union position, is not determinative. The language referenced in the grievance is Paragraph 32 C. That provision says, "Note: See

paragraph 13 for practice regarding scheduling of weekend work within departments." Joint Exhibit 1 and Union Exhibit 1.

The Contract provides that the higher rate follows the worker in the higher classification. The exact language is found in Section V, entitled "Hours, Overtime, Holiday Compensation, Jury Pay and Funeral Leave". (Emphasis added.) Paragraph 13, in that section, is straightforward: "The affected employee will not be paid less than the rate of their regular job classification." Joint Exhibit 1.

If the language was not so precise and clear, past practice might be a consideration. The testimony the Employer offered was that the practice was inconsistent. See testimony of Lippert at 156. To the contrary, Ender testified that the practice of paying employees their higher hourly rate for overtime work was consistent, until lately when the matter was grieved. Transcript at 60. He said, "Actually since March 1988 until just recently, with this grievance, there was never a question about it. I mean, they wanted all the bodies they could. They would say cleaning, come, and everybody got paid their rate of pay. Year in and year out." Transcript at 60. I find Ender's testimony credible.

Plain Meaning

However, past practice doesn't come into the picture in light of the sixteen clear words of Paragraph 13. Anyway you cut it, the pay follows the person for weekend overtime work. "While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain meaning" principle of contract interpretation will refuse to consider evidence of a past practice

that is inconsistent with a provision that is "clear and unambiguous on its face." Elkouri & Elkouri , *How Arbitration Works,* 6th Ed., BNA at 12-24.

The "plain meaning" rule states that "if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived from the nature of the language used." *Ralphs Grocery Co.,* 109 LA33, 35-6 (Kaufman, 1997), as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 9-8.

The sentence under the section entitled, in part, "Overtime", reads, "The affected employees will not be paid less than the rate of their regular job classification." Joint Exhibit 1, Union Exhibit 1. The prohibition of "paying less" is clear and determinative. It prohibits rather than allows.

It is instructive to consider what the sentence doesn't say. The sixteen-word sentence includes no exceptions for weekend work. The sixteen word sentence says nothing about the job to be done in the overtime, the focus the Employer argues for. It speaks only to the regular pay of the employee doing the overtime work. The wording is straightforward and leaves nothing to speculation.

This sixteen word sentence must read in the context of the whole Contract. The preamble, in unnumbered paragraphs, talks of efficiency and communication. Joint Exhibit 1 and Union Exhibit 1. The Employer argues that this language is a rationale for paying overtime at the lower rate. Interpreting that language to require paying overtime at the cleaning or utility rate would negate the meaning of the sixteen words in the Overtime provision. "Sections or portions cannot be isolated from the rest of the agreement and given construction

independently of the purpose and agreement of the parties as evidenced by the entire document. The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole." *Great Lakes Dredge & Dock Co.,* 5 LA 409, 410 (Kelliher, 1946), as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 9-34.

The Employer argues in the post hearing briefing that paragraph 32 C 1 applies to the grievance at issue here. They argue that an employee will be considered laid off "whenever not scheduled for work on any day". Joint Exhibit 1. The assertion that if an employee is not working overtime on a Saturday and Sunday, they are laid off. That interpretation flies in the face of the common concept of layoff. That would make every worker who doesn't work seven days a week, on layoff. Such an interpretation would negate the note directly below it in the Contract; that is, the whole overtime provision, paragraph 13. The Contract has to be read as a whole and all its parts given meaning in context.

The Employer's argument that 13 C deals only with mandatory overtime is a similar work of fiction or wishful thinking. The Employer's reliance on Ender's admission that such an interpretation is "possible" is not adequate support for their contention. Anything is technically possible, but it is not how the contract has to be read and is read by this arbitrator.

If the title of the section, "Overtime", and the sixteen short words are not enough, the context argument leads to the same conclusion. The preamble portion of the Contract which is laid out at the very beginning, without section or paragraph numerals under the topic of "Philosophy". Joint Exhibit 1. Most people, including me, don't expect to find detail of wages paid or vacation days accrued in the general statements of philosophy. The description of the

philosophy speaks to the general mission of the company and the quality improvement process. You cannot bootstrap the Employer's position on overtime into a statement of philosophy especially when there is a specific section for overtime later in the Contract. Claiming that philosophy can be interpreted to negate a clear contractual provision is as strained an interpretation as the Employer's definition of layoff.

The Specific Restricts the General

More specific provisions generally restrict the meaning of the general provisions. Unless a contrary intention appears from the contract interpreted as a whole, or from relevant extrinsic circumstances, more specific provisions should restrict the meaning of a general position. *Square D Co.,*99 LA 879, 882 (Goodstein, 1992), as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 9-41. Here the specific provision in paragraph 13 for payment of the employee's higher pay rate in weekend overtime is specific and restricts the mission statement's general language. General language in a preamble to the Contract falls in the face of specific language in the body of the Contract. If the Employer wants this change, it must be gained at the bargaining table in negotiations.

The Employer claimed that paragraph 38 and 39 should govern the instant grievance. Those provisions are in Section IX entitled "Reassignment". We are dealing with overtime pay rate not reassignment. Reliance on those provisions is misplaced.

Award

The grievance is sustained. Employees in higher classifications who were paid utility wages for weekend overtime should be reimbursed by the Employer for the difference between

the utility rate and their higher classification rate starting with the May 30, 2014 payroll. This award does not include interest.

Dated this 24th day of November, 2015,

Carol Berg O'Toole